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In The
Supreme Court of the United States
October Term, 1993

**C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,**

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

**BRIEF OF CLARENDON FOUNDATION
AS AMICUS CURIAE IN
SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 36.2 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Respondent Town of Clarkstown. Written consent to the filing of this brief has been granted by counsel for

all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

Clarendon Foundation is a non-profit, non-partisan legal and educational foundation concerned with contemporary issues related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The foundation participates in various forums in cases where the resolution of constitutional issues may be aided by philosophical analysis in addition to case law and public policy considerations. Because this case raises questions of paramount significance to the public interest, we believe that our perspective will complement the brief of Respondent and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court reiterated that the central inquiry in dormant Commerce Clause analysis is whether the local law under scrutiny is "basically a protectionist measure" or, instead, fairly can be viewed as addressing legitimate local concerns. *Id.* at 624. A law is a protectionist measure when it is discriminatory against out-of-state interests -- when it has the purpose or effect of isolating a state from the national economy with the result that out-of-state interests are burdened while in-state interests are correspondingly benefited. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Discrimination against the free flow of commerce exists when a purpose is identified for treating in-state and out-of-state interests differently *on the basis of their origin*. *City of Philadelphia* at 627.

At the same time, municipal governments have long been authorized to enact laws relating to the health and safety of their residents, even when such measures may have an effect upon interstate commerce. *See, Kassell v.*

Consolidated Freightway Corp., 450 U.S. 662, 670 (1981)(the power of a state or municipality to implicate commerce "is never greater than in matters of traditionally local concern"). The regulation of solid waste collection and disposal is a function historically entrusted to local governments. Indeed, Congress has expressly provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies. . . ." 42 U.S.C. §6901(a)(4)(1988).

Clarkstown's Local Law 9 is a lawful resolution of the tension which is invariably present in disputes involving a municipality's jurisdiction over uniquely local matters. The "Balkanization" and "economic protectionism" decried by Petitioners are concerns which, quite simply, have no bearing on the facts of this case. Local Law 9 does not have a discriminatory purpose, facial or otherwise. Petitioners' argument that the law amounts to a "direct restriction on exports" misapprehends the legitimate factors at play in a municipality's decision how best to effect a plan for the collection and disposal of solid waste.

Nor does Local Law 9 have a protectionist effect. It is a regulatory measure which, by definition, must involve a degree of oversight. But Petitioners' argument from efficiency, taken to its logical conclusion, would render invalid virtually any local law that provided for waste collection and disposal in other than a purely commercial manner. To the contrary, local governmental control over waste collection and disposal issues is a proper exercise of the police power and Local Law 9 is a wholly legitimate manifestation of such power.

ARGUMENT

I. LOCAL LAW 9 DOES NOT HAVE A PROTECTIONIST PURPOSE.

Petitioners devote considerable energy to the proposition that Local Law 9 is facially or overtly discriminatory. By definition, in order to be discriminatory, a law must contain a classification. To demonstrate that the overt purpose of Local Law 9 is to discriminate against non-local users would require a showing that the law itself first differentiated among users generally, and then employed that classification to burden one group more than another.

A simple review of Local Law 9, however, reveals that it does not treat in-state and out-of-state interests disparately. Indeed, the law only applies to garbage discarded within the city of Clarkstown, with no reference at all to the origin of the garbage. Because the law draws no distinction between in-state and out-of-state garbage disposers, it is clear that no discriminatory purpose exists on its face.

A simple counterfactual makes the point even plainer. Certainly one can posit a local law which penalized non-local disposers -- for example, by charging a non-local disposal fee in addition to the tipping fee already required, or by requiring of non-locals a special permit to discard trash at the Clarkstown transfer station. In such a case, Petitioners may well be justified in claiming that the local law was overtly discriminatory. Local Law 9, however, involves no classification of any sort. Because discrimination against non-locals would require differentiation among customers generally -- but no such differentiation obtains here -- the law is not facially discriminatory.

In arguing to the contrary, Petitioners assert: "On its face, . . . Local Law 9 forbids individuals or companies located in Clarkstown from disposing of non-recyclable waste

by sending it directly to out-of-town or out-of-state facilities. . . ." This, Petitioners urge, constitutes a "direct restriction on exports," a facial purpose of the law pursued "at the direct expense of out-of-town residents who would otherwise send their trash to Petitioners' facility." Petitioners' Brief at 11.

This argument, however, does not show that Local Law 9 has a discriminatory purpose, as Petitioners claim. A legislative act, like any act, may have a particular consequence without such consequence's being a direct intent of the legislature. This is so even where the legislature may have envisioned that the consequence in question might materialize. Although the effects of legislation are relevant to its constitutionality (*see* Section II, *infra*), one cannot mechanically infer from the effects of legislation the purpose of its authors. Petitioners erringly conflate the purpose of Local Law 9 with a possible consequence that may flow from its implementation. In short, facial discrimination in the law must be found in the language of the law itself. Because no classification on the basis of origin is found in Local Law 9, it is not discriminatory on its face.

A similar fallacy is in play in Petitioners' claim that there is a discriminatory intent underlying Local Law 9. Noting the arrangement between the town and the contractor who would construct and operate the transfer station, Petitioners assert that any "purported safety and health benefits of Local Law 9 derive from the continued economic viability of the town's waste facility -- that is, from the town's desire not to pay under its guarantee to its contract." Petitioners' Brief at 26. In other words, Petitioners infer from the arrangement between the town and the contractor that the fundamental purpose of Local Law 9 is economic rather than consideration for health and safety. On that basis, Petitioners claim that Local Law 9 is a breach of the

Commerce Clause, apparently on the theory that an economic motivation somehow would reveal a discriminatory purpose.

Discriminatory intent for Local Law 9, however, is not implied by these facts. As the New York appellate court said in reference to Clarkstown's local plan to address waste collection and disposal: "A concern for the continuing economic viability of a solid waste management facility established pursuant to such a plan does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address." Petitioners' App. at 10a. The essential point is that the constitutional validity of Clarkstown's law should not be doubted merely because Clarkstown determined to handle its solid waste problem in an economically beneficial manner. As this Court recognized in *City of Philadelphia* regarding the purpose of the New Jersey law there in question: "[W]e assume New Jersey has every right to protect its residents' pocketbooks as well as their environment." *Id.* at 626.

Accordingly, there are no grounds to find Local Law 9 unconstitutional because its purpose is protectionist. No such purpose, facial or otherwise, can be discerned from the circumstances of this case.

II. LOCAL LAW 9 IS NOT PROTECTIONIST IN EFFECT.

Petitioners next argue that Local Law 9 is a protectionist measure because it assertedly has a discriminatory effect against out-of-state interests. The thrust of Petitioners' argument on this score is that Local Law 9 is a "prohibition" on the export of trash. Thus, Petitioners assert:

The effect of Local Law 9 is to prohibit flatly the export of trash to points outside of Clarkstown unless the trash is first brought to the designated facility for processing. This type of restriction -- "requiring business operations to be performed in the home [locality] that could more efficiently be performed elsewhere" -- is "virtually *per se* illegal," even if the locality is "pursuing a clearly legitimate local interest."

Petitioners' Brief at 18. Admittedly, Local Law 9 does involve a certain kind of restriction, but it is hardly an "export restriction" in any rational sense of that concept. Rather, the law involves a regulatory limitation on the way in which commercial activity related to the collection and disposal of trash is carried out. Thus, what Local Law 9 prohibits is the *wholly private removal* of garbage from Clarkstown. Petitioners conclude that such a limitation is "virtually *per se* illegal" because it purportedly requires a business operation to be performed at Clarkstown's facility which Carbone could perform more efficiently.

Even if it were true that Clarkstown's facility and Carbone's facility were commensurable and that Carbone's facility could be operated more efficiently, Petitioners' argument proves too much, for the same conclusion would follow if Clarkstown had adopted other non-controversial and plainly constitutional plans for handling solid waste disposal.

Suppose, for instance, that Clarkstown permitted multiple facilities so long as they were licensed pursuant to some local regulatory scheme. Even under this approach, it would remain true that the wholly private removal of garbage would be prohibited and, hence, to use Petitioners' language, that this business operation could be more

efficiently performed elsewhere (*i.e.*, in a purely private manner, under no regulatory scheme whatsoever). If Petitioners' reasoning were sound, however, it would follow that any number of non-controversial restrictions on the handling of garbage would fall to Commerce Clause attack, eviscerating the fundamental maxim that the Commerce Clause "does not elevate free trade above all other values," *Maine v. Taylor*, 447 U.S. 131, 151 (1986).

Indeed, through the years various federal and state courts consistently have sustained local governmental control of the collection and disposal process, even to the exclusion of private collectors, as a proper exercise of the police power. *See, e.g., Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981). This is so because there "a residuum of power in the State to make laws governing matters of local concern." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). Accordingly, because Petitioners' argument collapses when taken to its logical conclusion, it must be rejected.

Several other features of Petitioners' argument for a protectionist effect are equally invalid. For example, Petitioners argue that the cost-differential between the tipping fees at the Clarkstown transfer station and the Carbone plant is evidence of a discriminatory impact on out-of-state interests. Petitioners' argument appears to be that the \$11 difference between the two fees must be borne by out-of-state interests and thus manifests a burden on interstate commerce. For at least two reasons, this argument fails.

First, Carbone's out-of-state customers have dealt heretofore with Carbone rather than with Clarkstown. If Local Law 9 is upheld, Carbone will have to pay the Clarkstown facility a certain amount to effect the disposal of the non-recyclable portion of the trash. But there is no evidence before the Court as to what that cost might be.

The one thing we know for certain is that it is *irrelevant* to the \$11 differential in tipping fees and that fact is therefore not probative of the issue of discriminatory effect. That particular data would be probative only if the out-of-state firms would have to ship their trash to the Clarkstown facility instead of to Carbone if Local Law 9 were upheld.

Second, in any case, the Clarkstown transfer station is not a direct competitor of Carbone because their respective operations are different in nature. Clarkstown's transfer station consolidates local garbage into large loads and arranges for its shipment to final disposal sites. Carbone receives refuse for the purpose of gleaning from it recyclable material, as well as arranging for shipment of the residue to final disposal sites. For this reason, Petitioners' tying the asserted discriminatory effect to a difference in efficiency between the two operations is an error. The two facilities are incommensurable. Thus, the cost difference does not show that Carbone is more efficient at disposing of garbage than is the Clarkstown facility.

Moreover, even assuming for the sake of argument that a burden on interstate commerce of the sort Petitioners seek could be identified, it would be cognizable only if local economic interests were benefited as a result. *New Energy Co. v. Limbach*, 486 U.S. at 273 (A law is protectionist when it "benefits in-state economic interests by burdening out-of-state interests"). This would require evidence that Carbone's shipping the garbage component of its sorted refuse on its own, rather than sending it to the Clarkstown transfer station, resulted in some benefit to the town.

The only evidence Petitioners offer in this connection is the suggestion that "operations such as Petitioners', which bypass the designated facility, increase the likelihood that the guarantee [under the town's arrangement with the operator of the transfer station] might not be met." Petitioners' Brief at 26.

Upon reflection, however, it is clear that this information is not probative. First, a theoretical increase in the probability that the local community may benefit from the law does not show that the local community *actually* benefits from the law. Second, and more fundamental, even if it were true that Carbone's presence makes it more likely that the town might not meet its tonnage guarantee, we have no way of knowing on these facts how to quantify that probability. It is no doubt possible that substantial statistical movement in the direction of the town's not meeting its guarantee will have no impact at all on that prospect as a practical matter.

In short, the conclusion that residents of Carbone "benefit" from a purported burden on interstate commerce simply does not follow from Petitioners' argument. Indeed, it is more accurate to conclude that Clarkstown's residents themselves, rather than out-of-state entities, are the ones burdened by Local Law 9. For it is upon the local residents that the higher costs of the town's waste disposal plan fall.

At a more fundamental level, it is a mistake for Petitioners to analyze the effects of Local Law 9 on the assumption that garbage is a commodity subject to export. A commodity is something of value that is bought or sold, and only commodities are exported or imported. In the context of this case, garbage is neither a commodity nor an item of export. It is a valueless material significant only because it requires disposal *via* a disposal plan consistent with the health and safety of local residents. To suggest that the execution of that plan involves Clarkstown in commercial competition with Carbone -- as Carbone must claim to advance its "protectionist" argument -- is an addled notion. Recognizing at the threshold that garbage in this context should not be viewed as a commodity should preempt the controversy over relative "burdens" and "benefits" -- for those categories of analysis do not legitimately apply here.

In sum, it is incorrect that Local Law 9 is protectionist in effect, for there is no evidence that the law actually benefits local interests by burdening non-local interests. In addition, a miscellany of other reasons provide ample grounds for concluding that Carbone's analysis on this score is misconceived.

CONCLUSION

For these reasons, the Court should affirm the decision of the Supreme Court, Appellate Division, of the State of New York.

Respectfully submitted,

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